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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 888

LOCALS 107, 312, 331, 384, 470, AND 676 AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

A. DUIE PYLE, INCORPORATED, A. E. F. TRANSPORTATION, INCORPORATED, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO 56

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I. THE STIPULATED RECORD IS SUFFICIENT TO SUPPORT THE GRANTING OF CERTIORARI.

The National Labor Relations Board agrees that the court below erred in holding the contract clauses in question in violation of Section 8(e) of the Act. But it believes "in view of the stipulated record" this is not "an appropriate case for review."

This is a curious position. This is the same record to which its General Counsel stipulated with all the parties. It is the same record which the Board found sufficient to support its own Decision and Order. It is the same record which the Board found sufficient to support its request for affirmance by the Court of Appeals. Indeed, it is the same record which the court below found sufficient to support its reversal of the Board on the merits.[1]

Nor does the Board now suggest any possible aspect of the record which may be inadequate or any additional facts or testimony which may be helpful to the Court in considering this case.

It is respectfully submitted that the record supports the Board's Decision and Order, and is more than adequate to support the granting of the Petition. This case does not present a single question of fact. The only issue in dispute is the legality of certain contract language. Clearly, the record is sufficient to support a decision of that question.

This matter, of crucial importance in the administration of the National Labor Relations Act, and to the collective bargaining relationship between Petitioners and the carriers, has now been in litigation for more than three years. Its final adjudication by this Court should not be further deferred.

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1. At footnote 3 of its Brief the Board quotes the observation of the court below with respect to the record. That comment was directed to what the court called the "Union standards provision", which that court and the Employers agreed was lawful. (Pet. 8a; Er. Br. 8.) Therefore, the quotation of the court below to the stipulated record is not relevant to the issues before this Court. Moreover, the parties did stipulate with respect to the Union's purpose and intention; this stipulation quotes from this Court's first *Oliver* decision, 358 U. S. 283. (R. 32a-33a.)

II. THERE IS NO MERIT IN THE EMPLOYERS-RESPONDENTS' ARGUMENTS SUPPORTING THE DECISION BELOW.

The Employers-Respondents' (hereinafter Employers) Brief in opposition: (a) misstates the holdings in the *Oliver* decisions; (b) points up the extent to which the court below substituted its own judgment for that of the Union's concerning the necessity for certain contractual protections against subcontracting; and (c) relies on the error of the court below that the provisions in question are "Union standard provisions" designed to place non-unit drivers on an economic parity with unit drivers when, in fact, they are designed to prohibit the use of non-unit drivers and to protect the wages of those unit drivers who drive their own trucking equipment. (Pet. 8a.)

A.

Contrary to the Employers' statement that ". . . Article XXXII [at the time of *Oliver*] applied to an individual owner operator only when he was driving his own vehicle for a carrier . . ." (Br. 5), Article 32 then also provided "that hired or leased equipment, if not owner-driven [should] be operated only by employees of the certificated or permitted carriers . . ." *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 362 U. S. 605, at 605-06. Indeed, the fleet-owner question was the precise issue decided in the second *Oliver* case, where this provision was held to be lawful and primary. *Ibid.* at 606.

B.

The Employers argue (Br. 6) that the agreement not to subcontract "work or services presently performed or hereafter assigned to the collective bargaining unit", as well as the "elaborate language and procedures concerning economic conditions and negotiated rental and wage rates for owner-operators and fleet owners", demonstrates that the work which unit employees perform is protected. (Br. 7.) This argument, as the majority below acknowledged (Pet. 7a-8a), is fallacious; such contract language does not prevent the carriers from initially assigning new work to non-unit personnel.

More important, the Employers' argument is based on the same erroneous premise as the decision below: namely, that a union must, in a Section 8(e) proceeding, prove to a reviewing court's satisfaction the necessity for the contractual protections it seeks against subcontracting.

Even if it were true that Petitioners negotiated greater contractual protection against the erosion of unit work than was absolutely necessary, this would not demonstrate, as the court below seemed to think (Pet. 9a), a secondary objective, but, at most, an excess of caution in protecting its primary interest in preserving unit work. Moreover, here, where the Petitioners simply adopted, *in haec verba*, contract language which had long been incorporated in collective agreements throughout the trucking industry, and where, as recently as two years before Petitioners sought its adoption, there had been further diversions of unit work to non-unit personnel (R. 39a), the question of "necessity" is particularly inappropriate.

Undoubtedly, in Section 8(e) proceedings, a court, like the Board, must analyze contract language banning subcontracting to determine its purpose; but it cannot—without substituting its own judgment for that of the parties—

base a finding of secondary object on its belief that a bargaining unit can survive with a lesser amount of protection than its representative deems necessary. It is doubtful that a court has either the experience or the expertise to "second guess" unions on questions of appropriate contractual protections against subcontracting. In any event, there is no evidence that Congress, in adopting Section 8(e), intended to depart from the principle that the legality of contract provisions does not turn upon the Board's or Court's view of their necessity or their wisdom. *United States* v. *Hutcheson*, 312 U. S. 219 at 232; *NLRB* v. *American National Ins. Co.*, 343 U. S. 395, 404, 402; *NLRB* v. *Insurance Agents' Union*, 361 U. S. 477 at 490.

C.

The Employers characterize the requirement that only employees may perform unit work as " a Union signatory clause" (Br. 9) and echo the decision below (Pet. 9a) that the provisions for wages and working conditions "relate to independent contractors observing union standards." (Br. 8.)[2] This simply is not true; on the contrary, the requirement that the unit carriers use their employees exclusively to perform unit work absolutely prohibits them from using "independent contractors" to perform this work.

2. A "Union standards clause" is a clause that limits subcontracting "to employers maintaining labor standards commensurate with those required" under the parties' collective agreement; such clauses are lawful, valid, primary regulations. *District 9, International Association of Machinists* v. *NLRB* (D. C. Cir. 1962), 315 F. 2d 33, 36 at n. 6; *Orange Belt District Council of Painters No. 48* v. *NLRB*, 328 F. 2d 534; *Meat & Highway Drivers, Local 710* v. *NLRB*, 335 F. 2d 709, 713, 715. A "Union signatory clause" is a clause that further limits subcontracting to employers who have signed union agreements; such clauses are unlawful. *Meat & Highway Drivers, supra.*

Like any total ban on the subcontracting of unit work, the provisions do not interfere with the employer's right to expand and contract the work force as the necessities of business dictate. In the trucking industry the employer frequently meets this need by hiring drivers who bring with them their own trucks (the tools of their trade), which they lease to the carriers. The elaborate safeguards set forth in Article 23 (City Cartage Agreement) and Article 24 (Over-the-Road Agreement) are designed to prevent carriers from using lease arrangements to depress the wages of such driver-employees. See *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U. S. 283 at 294. These safeguards do not change the fact that it is a total ban on subcontracting which is emphasized by the provision that only employees shall drive equipment (owned or leased) in the service of the employer.

The court below, because of its apparent failure to understand this, did not consider Petitioners' position that these clauses had two primary objectives: (1) to protect against a further loss of unit work to subcontractors; and (2) to require all unit work to be performed by unit employees. In fact, the requirement that all unit work be performed by unit employees encompasses both these primary objectives.

In sum, the Employers' Brief in Opposition highlights the misconceptions on which the decision below is based.

The Employers, of course, cannot dispute the importance of the case.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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